TABLE OF CONTENTS

Eighth Circuit Opinion dated January 22, 1996 . . . . A-1

Western District of Missouri Order dated July 12, 1993 . . . . . A-14

Eighth Circuit Judgment dated February 8, 1993 . . A-16

Western District of Missouri Judgment dated September 8, 1992 . . . . . A-17

Western District of Missouri Order dated September 8, 1992 . . . . . A-19

U.S. Const. art. VI, cl. 2 . . . . . A-25

Mo. Rev. Stat. § 144.010 (Supp. 1995) A-25

Mo. Rev. Stat. § 144.010.1(8)(b) A-25

Mo. Rev. Stat. § 144.020.1(1) and (3) (1994) A-26

Mo. Rev. Stat. § 144.021 (1994) A-27

Mo. Rev. Stat. § 144.060 (1994) A-27

Mo. Rev. Stat. § 144.080.4 and .5 (1994) A-28

Mo. Rev. Stat. § 144.285 (1994) A-29

Mo. Rev. Stat. § 149.015.4 (1994) A-30

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 93-3303

United States of America,	*	
	*	
Plaintiff-Appellee,	*	
	*	
v.	*	Appeal from the
	*	United States District
Janette Lohman, Director of	*	Court for the Western
Revenue, State of Missouri;	*	District of Missouri.
Missouri Department of	*	
Revenue;	*	
State of Missouri,	*	
	*	
Defendants-Appellants,	*	
	*	
Kansas City Power & Light	*	
Co.,	*	
	*	
Defendant.	*	

Submitted: May 15, 1995

Filed: January 22, 1996

Before McMILLIAN, BEAM and HANSEN, Circuit Judges.

BEAM, Circuit Judge.

Missouri imposed sales tax on electricity used at a federal facility, the Lake City Army Ammunition Plant. The United States argues that the tax is a constitutionally prohibited direct tax on the federal government. Alternatively, the United States contends that the contractor-operator of the plant, Olin Corporation, purchased the electricity from a vendor, Kansas City Power & Light Company, and then resold it to the federal government. Since the Missouri sales tax does not apply to such "sales for resale," the United States contends that the sale of electricity was not taxable.

Concluding that the "sale for resale" provision applied, the district court[1] granted the federal government's motion for summary judgment. Missouri appeals. After reviewing the grant of summary judgment de novo, we affirm because the tax is unconstitutional as a direct tax on the United States.

I. BACKGROUND

The United States Department of the Army owns the Lake City Army Ammunition Plant (the Plant), which manufactures small caliber ammunition. In 1951, the federal government entered into a contract, number DA-23-012 AV-76,[2] with Kansas City Power & Light Company (KCPL). Under the contract, KCPL "shall sell and deliver

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[1]The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

[2]Several years later, the contract number was changed to DAAA19-70-D-0001. No substantive change was effected. For simplicity's sake, we will refer to the contract by the old number or as "the 1951 contract."

to the Government and the Government shall purchase and receive from [KCPL] . . . electrical service" at the Plant. Jt. App. at 653. The contract provides that it "shall continue in effect until terminated at the option of the Government by the giving of not less than 30 days advance written notice of the effective date of termination." Id. Initially, KCPL submitted bills directly to the United States and the United States sent treasury checks to pay for the electricity. Title to the electricity passed directly from KCPL to the United States.

In an effort to reduce paperwork and administrative hassle, the federal government hired a contractor, Remington Arms, to run the plant. Shortly thereafter, the government requested that KCPL bill Remington Arms directly for all purchases. In 1962, the United States and KCPL modified the 1951 contract with a supplemental agreement.[3] Remington Arms was not a party to this agreement. The supplemental agreement provides that:

> The following paragraph is hereby inserted in the [1951] Contract:
>
> 1. SCOPE AND TERM OF CONTRACT
>
> It is understood and agreed between the parties that so long as the plant is operated for the Government by a CPFF Contractor, currently Remington Arms Company, Inc., orders for service under this contract may be placed with [KCPL] by such CPFF Contractor and will be honored to the

---

[3]The 1951 contract has also been modified in other minor ways. These modifications are not relevant here.

> same extent as will orders placed by the Government, all in accordance with the terms and conditions of this contract. Furthermore, during such period of time [KCPL] agrees that placing of such orders, and payment thereof by such CPFF Contractor, will satisfy the requirements of this contract concerning minimum monthly accounts to be ordered and paid for by the Government.

Jt. App. at 674. Under the contract as modified, title to the electricity still passes directly from KCPL to the government.

In 1985, Olin Corporation succeeded Remington Arms as the CPFF Contractor for the plant.[4] Olin began informing outside vendors of the change in contractors. During this time, Olin issued a purchase order on its own stationery, referencing the 1951 contract,[5] and requesting continued electricity in accordance with the contract's terms.[6] The federal government has never provided KCPL with

---

[4]Olin's contract with the federal government provides that Olin acts as an independent contractor and not as an agent of the government.

[5]Relying on an isolated typographical error, Missouri contends that Olin's purchase order references not the 1951 contract but a 1947 contract that coincidentally bears the exact number as the 1951 contract. This assertion is entirely unsupported. We agree with the district court that the 1951 contract is the contract at issue.

[6]The typewritten portion of the purchase order provides in relevant part:

> PROVIDE ELECTRIC SERVICE TO THE LAKE CITY ARMY AMMUNITION PLANT, INDEPENDENCE, MISSOURI, IN ACCORDANCE

the written notice required to formally terminate the 1951 contract.

Determining who actually purchases the Plant's electricity first became an issue during an audit of KCPL by the Missouri Department of Revenue. As the supplier of electricity, it is KCPL's responsibility to submit remitted sales tax to the Missouri Department of Revenue. The Department of Revenue, after concluding that Olin purchases the plant's electricity, assessed back taxes relating to the Plant for the period of January 1986 to September

---

> WITH CONTRACT NO. DA-23-012 AV-76 . . . BETWEEN THE UNITED STATES OF AMERICA AND THE KANSAS CITY POWER & LIGHT COMPANY.
>
> . . .
>
> Effective November 3, 1985, Olin Corporation, Winchester Group, became the new Contractor-Operator of the Lake City Army Ammunition Plant under Prime Contract Number DAAA09-85-Z-0006.
>
> . . .
>
> This Purchase Order covers electric services for the period November 3, 1985 through November 2, 1986 and shall automatically be extended for another year as long as the Buyer is required to process and pay invoices under Prime Contract Number DAAA09-85-Z-0006. This purchase order shall continue in effect until terminated at the option of the Buyer/U.S. Government by the giving of not less than thirty (30) days advance written notice of the effective date of termination.
>
> The terms and conditions of this purchase order shall be the same as Government Contract No. DA-23-012 AV-76 and Purchase Order No. LCO 83843 [Remington Arms Company's purchase order].

Jt. App. at 257-61.

1989. KCPL paid the taxes under protest and commenced state administrative proceedings challenging the assessment. KCPL also brought a lawsuit against Olin, demanding payment of the taxes.

The United States Government then brought this action challenging the imposition of the sales tax. As previously indicated, the district court determined that the "sales for resale" provision applied and granted the government's motion for summary judgment.

II. DISCUSSION

Missouri argues, among other things, that an intervening decision of this circuit makes the relief granted by the district court on the "sale for resale" issue improper. See United States v. Lohman, 21 F.3d 844 (8th Cir. 1994). Rather than decide that issue, we exercise our option to affirm the district court's judgment on any grounds supported by the record. See Keller v. Bass Pro Shops, Inc., 15 F.3d 122, 123 (8th Cir. 1994). In doing so, our focus shifts to the federal government's argument that assessing Missouri sales tax upon electricity sold to the plant is an unconstitutional tax on the United States itself.

"[A] State may not, consistent with the Supremacy Clause, U.S. Const. Art. VI, cl. 2, lay a tax 'directly upon the United States.'" United States v. New Mexico, 455 U.S. 720, 733 (1982) (quoting Mayo v. United States, 319 U.S. 441, 447 (1943)). Under current conceptions of federal immunity, this prohibition means that "the States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals." South Carolina v. Baker, 485 U.S. 505,

523 (1988). Taxes are considered to fall directly upon the federal government only if the legal incidence of the tax falls on the federal government itself. See, e.g., United States v. County of Fresno, 429 U.S. 452, 459-460 n. 7 (1977); New Mexico, 455 U.S. at 742.

Missouri contends that taxing the plant's electricity is not a direct tax on the United States. First, it argues that the Missouri tax statute places the legal incidence of Missouri's sales tax on the seller, KCPL, and not the purchaser. Because it is undisputed that the federal government is not the seller, Missouri reasons that the sales tax cannot possibly be a tax on the government. Alternatively, Missouri contends that even if the statute places the legal incidence of the sales tax on the purchaser, Olin purchases the electricity, not the federal government.

A.

The terms of a statute control where the legal incidence of the tax falls. "[A] sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser." First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 347 (1968); accord, United States v. Tax Comm'n, 421 U.S. 599, 608 (1975). Missouri argues that the Missouri sales tax law does not require passing the tax on to the purchaser.

The introductory portion of the Missouri sales tax statute provides, "A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Mo. Rev. Stat. § 144.020.1.[7]

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[7]Electricity is specifically included in this tax. See Mo. Rev. Stat. § 144.020.1(3).

Other portions, however, emphasize the purchaser's role, stating that the seller "shall collect the tax from the purchaser," and making it a misdemeanor for a purchaser to refuse to pay Missouri sales tax. Mo. Rev. Stat. §§ 144.080.4; 144.060.

To interpret this potentially conflicting language, Missouri urges us to adopt the position of the Missouri state courts, who have repeatedly construed the sales tax as a tax upon the seller. See, e.g., Centerre Bank v. Director of Revenue, 744 S.W.2d 754, 759 (Mo. 1988); Farm & Home Savings Assoc. v. Spradling, 538 S.W.2d 313, 316 (Mo. 1976). In doing so, Missouri courts have regarded the legal duty of purchasers, under section 144.060, to pay the sales tax, as essentially irrelevant. "The fact that the purchaser bears the economic burden of the sales tax does not alter the statutory scheme which imposes the sales tax on sellers." Centerre Bank, 744 S.W.2d at 759.

In determining the existence of federal immunity, we are not bound by the Missouri courts' interpretation of state tax law. Diamond Nat'l Corp. v. State Bd. of Equalization, 425 U.S. 268 (1976) (per curiam). Nonetheless, if the state courts' determination is "consistent with the statute's reasonable interpretation it will be deemed conclusive." American Oil Co. v. Neill, 380 U.S. 451, 455-56 (1965).

The Missouri courts' construction of the sales tax may be appropriate, for instance, when Missouri is attempting to collect the tax from noncompliant sellers. When evaluating the legal incidence of the tax for immunity purposes, however, we find the Missouri courts' construction inconsistent with the statutes' reasonable interpretation. As noted, Missouri law provides that the seller "shall collect from the purchaser" the amount of sales tax due. Mo. Rev. Stat. § 144.080.4. The purchaser's

failure to pay the tax is a misdemeanor. Mo. Rev. Stat. §§ 144.060. Given these provisions, and for the sole purpose of determining the existence of federal immunity, we find that the legal incidence of the Missouri sales tax falls on the purchaser.[8]

Our conclusion is confirmed by the section which prohibits sellers from "advertis[ing] or hold[ing] out or stat[ing] to the public or to any customer directly or indirectly that the [sales] tax . . . required to be collected by him, will be assumed or absorbed by the [seller,] or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded." Mo. Rev. Stat. § 144.080.5. This ban against public display of a seller absorbing the tax suggests that Missouri intended for the tax to fall upon the purchaser. See, e.g., First Agricultural Nat'l Bank, 392 U.S. at 347-48 (construing a similar provision in a Massachusetts statute to imply that the tax is on the purchaser).

B.

Concluding that the Missouri statute places the legal incidence of its sales tax upon the purchaser does not end our inquiry. We must determine whether the federal government is the purchaser of the electricity. If it is, the legal incidence of the tax falls on the federal government and the tax is prohibited as a direct tax on the United States.

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[8]Missouri's argument may also have little relevance because of our ultimate conclusion that imposing the sales tax on the Plant's electricity is unconstitutional as a direct tax on the United States. As such, the sale of the electricity to the United States is a tax-exempt transaction under Missouri law. See Mo. Rev. Stat. § 144.030.1.

The United States has been actively involved in obtaining electricity. It negotiated future rates and chose the vendor for the electricity, KCPL. It executed an indefinite delivery contract with KCPL in 1951. The plain language of the 1951 contract provides that "the Government shall be liable for the minimum monthly charge specified in this contract." Jt. App. at 653. Although the 1951 contract has been modified several times, the contract is still in existence. Conversely, Olin does not have a direct contract with KCPL.[9] At most, Olin serves as the federal government's "paymaster," and has a contractual obligation to pay for the electricity under its contract with the federal government. Taken as a whole, these factors require the conclusion that the federal government, and not Olin, is the purchaser of the Plant's electricity.

Despite the federal government's involvement, Missouri contends that Olin is the purchaser because Olin fills out the paperwork and signs the checks. To support its argument, Missouri relies on cases such as United States v. New Mexico, 455 U.S. 720 (1982), and Alabama v. King & Boozer, 314 U.S. 1 (1941). Those cases do not require a denial of immunity here. In both cases, the contractors made the purchases in their own names and had direct contractual liability to the vendors. New Mexico, 455 U.S. at 743; King & Boozer, 314 U.S. at 11-12. There, the federal government did not have a separate contract with

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[9]Missouri's contention that Olin's purchase order represents a separate contract with KCPL is unsupported. The purchase order does not purport to be a separate contract. It requests KCPL to provide electric service to the Plant in accordance with the 1951 contract between the United States of America and KCPL. The third page of the purchase order reiterates that the terms and conditions of the purchase order shall be the same as the 1951 contract. For these reasons, the purchase order is most properly considered to be an administrative or procedural document.

the vendor, but attempted to obtain immunity based in part on its responsibilities under its internal contract with the contractor. New Mexico, 455 U.S. at 724, 743; King & Boozer, 314 U.S. at 8, 10. Here, the federal government has a direct contract with the vendor and the contractor does not. Because of these differences in contractual obligations, New Mexico and King & Boozer have little relevance.[10]

Although it is not controlling, our decision is supported by the reasoning of our sister circuit in United States v. Kabeiseman, 970 F.2d 739 (10th Cir. 1992). The Kabeiseman court determined that the United States was immune from Wyoming sales tax on diesel fuel used by a contractor at a federally owned facility. Id. at 744. In Kabeiseman, the contractors told the federal government how much fuel it needed, and then the federal government ordered the fuel directly from a government-chosen vendor. Although title passed directly to the federal government, the contractors accepted delivery of the fuel, exercised substantial control over the use of the fuel, and paid the bills directly to the vendor. In finding the federal government immune from the state sales tax, the Kabeiseman court relied primarily on the federal government's intensive involvement with the vendor: The United States "placed the orders for diesel fuel, as well as

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[10]Missouri also argues that granting the federal government immunity here permits federal immunity to be acquired by the "stroke of a pen." We are mindful of the Supreme Court's wariness towards immunity that can be acquired without cost to the federal government. See New Mexico, 455 U.S. at 737 (criticizing government's technical argument that its contractors are entitled to immunity "because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement"). As we have previously indicated, however, the federal government's involvement here surpasses technicalities: its own credit is on the line.

taking title thereto, directly from the vendor." Id. at 743. The federal government's involvement with KCPL is similarly intensive.[11]

Aside from its constitutional argument, Missouri provides two reasons why we should consider Olin to be the purchaser of the electricity. Neither reason is persuasive. First, Missouri contends that the 1962 supplemental agreement discharged the federal government's obligation. See supra page 3. We disagree. The terms of the supplemental agreement do not unconditionally discharge the federal government from its obligations. Instead, the supplemental agreement merely permits actions by another party, Olin, to satisfy the federal government's obligations. If Olin fails to order or pay for electricity, the terms of the supplemental agreement do not exempt the federal government from liability.

Second, Missouri argues that because the federal government conceded that it might suffer tax disadvantages after implementing the supplemental agreement, it should not receive immunity from taxation. The alleged concession involves the federal government's admission that permitting contractors to deal directly with vendors was a calculated risk.[12] We do not consider the alleged

---

[11]Missouri argues that Kabeiseman is distinguishable because the checks issued by the Kabeiseman contractor were drawn directly on federal funds, rather than the reimbursement method used by Olin. The Kabeiseman court did not rely on the funding mechanism, however, and we do not consider the small funding difference to suggest a different result here.

[12]The alleged concession is as follows:

> It is the responsibility of the CPFF or other cost type contractor to utilize [federal government] indefinite delivery type contracts for any and all types of services

concession relevant in our determination of federal immunity. To do otherwise transforms cautious planning by federal bureaucrats into an invitation for states to rummage through the federal pocketbook.

We have considered Missouri's other arguments and find them to be without merit.

III. CONCLUSION

Under the present contractual arrangement, we conclude that the United States Constitution prohibits Missouri from imposing sales tax on electricity for the Lake City Army Ammunition Plant because such a tax is a direct tax on the federal government. We therefore affirm the judgment of the district court.

A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

and supplies where the price, quality and terms obtained are more advantageous than could be obtained otherwise. In certain instances it is possible that the Government will suffer tax disadvantages as a result of this revised procedure. The procedure has been adopted with due advertence to this fact on the basis that the overall savings possible thereby will more than offset any possible cost increase resulting from taxes.

Jt. App. at 1786.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 90-0598-CV-W-1**
	)	**90-0640-CV-W-1**
William Melcher, et al.,	)	
	)	
Defendants.	)	

[Filed July 12, 1993]

ORDER

On March 4, 1993, this Court ordered the parties to show cause why this Court should not lift the abeyance order entered in this action and enter final judgment granting the declaratory and injunctive relief sought in the amended complaint of the United States. After having considered the issues presented in the parties' briefs, and inasmuch as any review of this Court's order is properly conducted at the appellate level, it is appropriate for this Court, already having granted the United States' motion for summary judgment, to enter a final order granting the relief sought in the United States' amended complaint.

Accordingly, it is

ORDERED that the abeyance order entered in this action on March 2, 1993 is hereby lifted. It is further

ORDERED that the imposition, assessment, or collection by the State of Missouri of sales taxes on

purchases of electrical power by the contractor operator of the Plant for the operation of the Plant under its separate contract with the Army is unlawful, void, and of no effect because the contractor operator purchased the electrical power with the purpose of reselling it to the United States, and the sales to the contractor operator are not retail sales within the purview of Mo. Rev. Stat., Section 144.010.1(8). It is further

ORDERED that the defendants, their successors in office, their employees, agents, attorneys, and all persons acting in concert with them who shall receive notice thereof, are enjoined from assessing, imposing, or collecting Missouri sales tax on sales of electrical power by Kansas City Power & Light Company to the contractor operator of the Plant for the purpose of operating the Plant under its separate contract with the Army. It is further

ORDERED that plaintiff's request for its costs in this action is DENIED.

Dean Whipple
United States District Judge

Date: July 12, 1993

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 92-3643 WMKC

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court for
	*	the Western District of
vs.	*	
	*	
William H. Melcher,	*	
Acting Director	*	
of Revenue, State of	*	
Missouri,	*	
Missouri Department of	*	
Revenue,	*	
State of Missouri,	*	
	*	
Appellants.	*	

JUDGMENT

Appellants' agreed motion to dismiss this appeal is granted, and the appeal is hereby dismissed and remanded to the district court for further proceedings.

The court's mandate shall issue forthwith.

February 8, 1993

Order Entered Under Rule 27B(a):

Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NUMBER:
	)	90-0598-CV-W-1
RAYMOND T. WAGNER, et al.,	)	90-0640-CV-W-1
	)	
Defendants.	)	

[Filed September 8, 1992]

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_____ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

__x__ **Decision by Court.** This action was briefed by the parties. The issues were reviewed and a decision has been rendered.

IT IS ORDERED that the motion of the United States for summary judgment, filed July 1, 1991 is GRANTED. It is further

ORDERED that the motion of the State of Missouri for summary judgment filed June 17, 1991, and Missouri's Supplemental Motion for Summary Judgment, filed July 31, 1991 are DENIED.

Entered on August 8, 1992
Setpember 8, 1992
Date

R.F. Connor
Clerk

Carol Kuhl
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 90-0598-CV-W-1
	)	90-0640-CV-W-1
RAYMOND T. WAGNER, et al.,	)	
	)	
Defendants.	)	

[Filed September 8, 1992]

ORDER

This is a civil action involving the issue of whether a state may impose a tax on the sale of electrical power to a federally-owned facility operated by a private contractor-operator. Specifically, this case raises the question of whether the State of Missouri may impose Missouri sales tax on sales of electrical power used in the operation of the Lake City Army Ammunition Plant ("the Plant"). The Plant, which presently is operated by Olin Corporation, is a federally-owned facility located in Independence, Missouri used principally for the manufacture of small arms ammunition. All of the machinery and equipment at the Plant is titled to and owned by the United States and not Olin.

On April 1, 1951, Kansas City Power & Light Company ("KCPL) entered into a contract ("KCPL contract") with the United States Department of the Army, pursuant to which KCPL agreed to sell electrical power to the United States for use in operating the Plant. The KCPL

contract provides that KCPL, as the contractor, "shall sell and deliver to the government and the government shall purchase and receive from the contractor . . . electrical service at the plant." KCPL and the United States were the only parties to the KCPL contract. In 1960, the KCPL contract was modified to allow monthly billing for electrical power to be sent directly to and paid by the contractor-operator of the Plant. In 1962 a Supplemental Agreement was reached which permitted the contractor-operator to place orders with KCPL. The Supplemental Agreement stated that such orders "will be honored to the same extent as will orders placed by the government all in accordance with the terms and conditions of (the original contract). KCPL and the United States were the only parties to the Supplemental Agreement. From at least 1962 to the present, the contractor-operator at the Plant initially has paid the bills for electrical power and, pursuant to the contractor-operator's separate contract with the Army for the maintenance and operation of the plant ("M&O contract"), the contractor-operator has been reimbursed in full by the United States. Olin Corporation ("Olin") has served as the contractor-operator of the Plant since November 3, 1985.

The M&O contract between Olin and the United States is a cost-plus-award-fee contract whereby Olin receives an annual fee, in addition to the reimbursement of out-of-pocket costs incurred in operating, managing and maintaining the plant. The total fee potential is established in advance, based upon projected operations for the upcoming year. The total fee potential is divided into two components: (1) a base fee, and (2) and award fee. The base fee portion, which is 15 percent of the total fee potential, is paid in 12 approximately equal monthly installments and represents basically a fixed fee. On the other hand, the award fee portion is paid annually and is

based upon the United States' evaluation of Olin's performance in operation and management of the plant during the year. Additionally, under the M&O contract, Olin is obligated to furnish all of the qualified personnel needed to manage and operate the plant with salaries and other allowable personnel costs reimbursed by the Army.

On December 15, 1989, the Missouri Department of Revenue ("Missouri") assessed KCPL $667,562.23 for sales tax, interest and penalties on sales of electrical power used in the operation of the Plant between January 1986 and September 1989. KCPL thereafter paid this tax assessment under protest and brought suit against Olin seeking indemnification for all sales tax paid or alternatively, a judgment against Missouri declaring the sales of electrical power to the Plant to be exempt from the imposition of state sales tax. Also as a result of the tax assessment levied against KCPL, the United States brought suit against Missouri and KCPL seeking a declaratory judgment and permanent injunction prohibiting Missouri from assessing a tax on sales of electrical power used at the Plant. The two cases were consolidated by order of the Court on November 13, 1990 and are currently before this Court on cross motions for summary judgment. The material facts are not in dispute.

DISCUSSION

The State of Missouri imposes a sales tax upon "the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." MO. REV. STAT. § 144.020.1. A sale at retail is defined as "any transfer made by any person engaged in business . . . of the ownership of or title to tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property

for valuable consideration." MO. REV. STAT. § 144.010.1(8) (emphasis added). The statutes specifically include sales of electricity or electrical current as possible retail sales in Missouri. MO. REV. STAT. § 144.020.1(3).

In protesting Missouri's assessment of sales tax on the sales of electrical power to the Plant, the United States and Olin alternatively argue that, either the proposed sales tax violates principles of constitutional federalism or that the transaction at issue is "for resale" and therefore exempted from the coverage and scope of the Missouri sales tax law. With regard to the former analysis, the United States and Olin argue that, pursuant to the KCPL contract, the United States is the real purchaser of the electrical power. They assert that Olin, as the contractor-operator, merely performs the simple task of paying the electrical bill, for which Olin is fully reimbursed by the United States pursuant to the M&O contract. Therefore, the United States and Olin argue, because the sale of electricity occurs between the KCPL and the United States, it is not a sale upon which Missouri may impose a tax inasmuch as the Supremacy Clause of the Constitution prohibits a state from levying any tax directly upon the United States. United States v. Mexico, 455 U.S. 720, 733 (1982). In response to this argument, Missouri asserts that the sale of the electrical power, in fact, is a taxable sale inasmuch as Olin, and not the United States, uses and consumes the electricity at the plant. In addition, Olin and the United States argue that if Olin is found to purchase the electrical power from KCPL, it does so for resale to the United States making the transaction exempt from Missouri sales tax under MO. REV. STAT. § 144.010.1(8). In United States v. Benton, 772 F. Supp. 453 (W.D.Mo. 1990), Judge Hunter of this Court addressed the question of whether sales from various vendors of tangible personal property to Olin were sales that could be taxed by the State of Missouri. The

Court in Benton concluded that the sales of the those properties were sales for "resale" to the United States and thus were exempt under Missouri law. Judge Hunter reasoned that because the transaction resulted in immediate passage of title from a third party vendor to the United States, at the time of delivery, the only significant interest Olin possessed in the property was temporary dominion to designate the transfer of title. Id. at 461. The Court in Benton reasoned that once title passed, Olin no longer had dominion over the property and the United States had discretion as to the utilization of the property. "Thus, a resale is effected, making Olin's purchases of tangible personal property in accord with its contract with the U.S., a nontaxable transaction pursuant to § 144.010.(8)." Id.

The reasoning in Benton is equally applicable, and persuasive, in the instant case.[1] There is no meaningful basis for distinction between the tangible personal property sold in Benton and the intangible electrical power sold in the instant case. The Missouri sales tax statutes explicitly include retail sales of electrical power as taxable to the same extent as retail sales of tangible personal property. Likewise, the "resale" of electrical power should be exempt from the Missouri sales tax just as the resale of tangible personal property as concluded in Benton.

---

[1]The only critical factual distinction between these two cases would appear to be the existence in the instant case of a contract directly between the vendor (KCPL) and the United States. In Benton, Olin, and not the United States, had contracted with the third party vendors. The fact that a contract between KCPL and the United States exists in the instant case makes it more likely the United States, rather than Olin, purchases the electrical power. If such is the case, of course, the same result would ensue as that reached in Benton and in this opinion inasmuch as the sale of the electrical power would be exempt from a state's sales tax pursuant to the Supremacy Clause.

Accordingly, for the foregoing reasons, it is

ORDERED that the motion of the United States for summary judgment, filed July 1, 1991, is GRANTED. It is further

ORDERED that the motion of the State of Missouri for summary judgment, filed June 17, 1991, and Missouri's Supplemental Motion for Summary Judgment, filed July 31, 1991 are DENIED.

_____

DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATE: Sept. 8, 1992

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI, cl. 2

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Mo. Rev. Stat. § 144.010.1(8)(b) (Supp. 1995)

144.010. Definitions.—1. The following words, terms, and phrases when used in sections 144.010 to 144.510 have the meanings ascribed to them in this section, except when the context indicates a different meaning:

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(8) **"Sale at retail"** means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration; except that, for the purposes of sections 144.010 to 144.510 and the tax imposed thereby: (i) purchases of tangible personal property made by duly licensed physicians, dentists, optometrists and veterinarians and used in the practice of their professions shall be deemed to be purchases for use or consumption and not for resale; and (ii) the selling of computer printouts, computer output or microfilm or microfiche and computer assisted

photo compositions to a purchaser to enable the purchaser to obtain for his own use the desired information contained in such computer printouts, computer output on microfilm or microfiche and computer assisted photo compositions shall be considered as the sale of a service and not as the sale of tangible personal property. Where necessary to conform to the context of sections 144.010 to 144.510 and the tax imposed thereby, the term "sale at retail" shall be construed to embrace. . . .

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(b) Sales of electricity, electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers. . . .

Mo. Rev. Stat. § 144.020.1(1) and (3) (1994)

144.020. Rate of tax. - A tax is hereby levied and imposed upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state. The rate of tax shall be as follows:

(1) Upon every retail sale in this state of tangible personal property, a tax equivalent to four percent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to four percent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange, except as otherwise provided in section 144.025;

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(3) A tax equivalent to four percent of the basic rate paid or charged on all sales of electricity or electrical current, water and gas, natural or artificial, to domestic, commercial or industrial consumers. . . .

Mo. Rev. Stat. § 144.021 (1994)

144.021. Imposition of tax - seller's duties. - The purpose and intent of sections 144.010 to 144.510 is to impose a tax upon the privilege of engaging in the business, in this state, of selling tangible personal property and those services listed in section 144.020. The primary tax burden is placed upon the seller making the taxable sales of property or service and is levied at the rate provided for in section 144.020. Excluding sections 144.070, 144.440 and 144.450, the extent to which a seller is required to collect the tax from the purchaser of the taxable property or service is governed by section 144.285 and in no way affects sections 144.080 and 144.100, which require all sellers to report to the director of revenue their **"gross receipts"**, defined herein to mean the aggregate amount of the sales price of all sales at retail, and remit tax at four percent of their gross receipts.

Mo. Rev. Stat. § 144.060 (1994)

144.060. Purchaser to pay sales tax - refusal, a misdemeanor - exception. - It shall be the duty of every person making any purchase or receiving any service upon which a tax is imposed by sections 144.010 to 144.510 to pay, to the extent possible under the provisions of section 144.285, the amount of such tax to the person making such sale or rendering such service; any person who shall willfully and intentionally refuse to pay such tax shall be

guilty of a misdemeanor; provided, however, that the provisions of this section shall not apply to any person making any purchase or sale of a motor vehicle subject to sales tax as provided by the Missouri sales tax law.

Mo. Rev. Stat. § 144.080.4 and .5 (1994)

144.080. Seller responsible for tax - returns - unlawful to advertise absorption of tax - penalty.

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4. The seller of any property or person rendering any service, subject to the tax imposed by sections 144.010 to 144.525, shall collect the tax from the purchaser of such property or the recipient of the service to the extent possible under the provisions of section 144.285, but his inability to collect any part or all of the tax does not relieve him of the obligation to pay to the state the tax imposed by section 144.020; except that the collection of the tax imposed by sections 144.010 to 144.525 on motor vehicles and trailers shall be made as provided in sections 144.070 and 144.440.

5. It shall be unlawful for any person to advertise or hold out or state to the public or to any customer directly or indirectly that the tax or any part thereof imposed by sections 144.010 to 144.525, and required to be collected by him, will be assumed or absorbed by the person, or that it will not be separately stated and added to the selling price of the property sold or service rendered, or if added, that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Mo. Rev. Stat. § 144.285 (1994)

144.285. Tax brackets to be established by director of revenue - how applied - taxpayer owing more than one political subdivision, distribution, penalties. - 1. In order to permit sellers required to collect and report the sales tax to collect the amount required to be reported and remitted, but not to change the requirements of reporting or remitting tax or to serve as a levy of the tax, and in order to avoid fractions of pennies, the director of revenue shall establish brackets, showing the amounts of tax to be collected on sales of specified amounts, which shall be applicable to all taxable transactions.

2. In all instances where statements covering taxable purchases are rendered to the taxpayer on a monthly or other periodic basis, the amount of tax shall be determined by applying the applicable tax rate to the taxable purchases represented on the statement, rounded to the nearest whole cent, or by application of the brackets established by the director of revenue, at the option of the retail vendor.

3. No vendor or seller shall knowingly charge or receive from a purchaser as a sales tax any sum in excess of the sums provided for in this section.

4. A vendor may, at his option, determine the amount charged to and received from each purchaser by use of a formula which applies the applicable tax rate to each taxable purchase, rounded to the nearest whole cent. The formula shall be uniformly and consistently applied to all purchases similarly situated.

5. Amounts which a vendor charges to and receives from the purchaser in accordance with this section

shall not be includable in his gross receipts if the amounts are separately charged or stated.

6. If sales tax for one or more local political subdivisions is owed by a taxpayer pursuant to chapter 66, 67, 92, or 94, RSMo, and that taxpayer remits less than all sales tax due for a filing period specified in section 144.080, the director of revenue shall deposit the tax remitted proportionately to each taxing jurisdiction in accordance with the percentage that each such jurisdiction's share of the tax due for the filing period bears to the total tax due from such taxpayer for such period. The unpaid balance due along with penalties and interest shall be similarly prorated among the state and all local jurisdictions for which tax was due during the filing period for which an underpayment occurs. The provisions of this subsection shall apply to all returns or remittances relating to sales made on or after January 1, 1984.

Mo. Rev. Stat. § 149.015.4 (1994)

149.015. Rate of tax - how stamped - samples, how taxed - tax impact to be on consumer - fair share school fund, distribution.

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4. It shall be the intent of this chapter that the impact of the tax levied hereunder be absorbed by the consumer or user and when the tax is paid by any other person, the payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user with the person first selling the cigarettes acting as an agent of the state for the payment and collection of the tax to the

state, except that in furtherance of the intent of this chapter no refund of any tax collected and remitted by a retailer upon gross receipts from a sale of cigarettes subject to tax under this chapter shall be claimed under chapter 144, RSMo, for any amount illegally or erroneously overcharged or overcollected as a result of imposition of sales tax by the retailer upon amounts representing the tax imposed under this chapter.